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Supreme Court of the United States

OCTOBER TERM 1948

No. 191.....

JOSEPH B. COOPER & SON, INC., as Owner of 84.80 Ounces of Platinum,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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July 12, 1949.

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Supreme Court of the United States

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No. .....

JOSEPH B. COOPER & SON, INC., as Owner of 84.80 Ounces of Platinum,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

JOSEPH B. COOPER & SON, INC. (a New York corporation), hereby respectfully applies for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to certify to this court, for review and determination, its proceedings and final judgment affirming (with the dissent of the Presiding Judge) a final judgment of the United States District Court in and for the Southern District of Florida, Miami Division, forfeiting to the United States of America, property of the appellant consisting of platinum rings weighing 84.80 ounces and directing the delivery thereof to the National Bureau of Standards of the Department of Commerce.*

* Forfeiture by such delivery seems to be in violation of the relied on statute. That statute provides that forfeited property should be directed to be sold and that the net proceeds be deposited in the United States Treasury except that "arms and munitions of war" shall be delivered to the War Department (22 U. S. C. 404). There is significance in the method of disposition because by section 407 the President, in his discretion, is authorized at any time to remit the condemned property to the owner.

The judgment of affirmance was rendered on May 19, 1949 (480, 492). The District Court judgment was entered on June 9, 1948 (471), after a trial on April 28-30, 1947 (58, 148, 247). This proceeding was initiated in the District Court on June 1, 1942 (1) following the procurement, on April 2, 1942, of a warrant of detention under 22 U. S. C. 402 (3, 471).

The Opinions Below

The opinion and findings of the trial court are set forth at pages 467-468 of the transcript of the record. The opinion is not reported. The District Court's final judgment appears at pages 471-473 of the transcript.

The prevailing and dissenting opinions in the Circuit Court of Appeals are not yet reported and appear at pages 480-491 of the transcript.

The substance of the several opinions appears at pages 9-13, *infra*.

Execution of the District Court's judgment was stayed during the pendency of the appeal to the Court of Appeals. The issuance of mandate by the Court of Appeals has been stayed during the pendency of this petition.

The Matter Involved

The Nature of the Proceeding

Forfeiture was here claimed and decreed under 22 U. S. C. 401 (quoted at pages 23-4, *infra*) *et seq.* for alleged violation of Section 6 of the Act of July 2, 1940 (54 Stat. 712, 714, 50 U. S. C. 701, quoted at pages 22-3, *infra*).

22 U. S. C. 401-8, enacted in 1917, provided for the seizure and forfeiture of goods *attempted and about to be exported* in violation of law. Section 6 of the Act of July

2, 1940 authorized the president, during the ensuing 2 years, to prescribe export controls, restrictions and prohibitions whenever he determined them to be necessary in the interest of national defense.

The Export Regulations Here Involved

At the time here involved—in March 1942—the export controls and restrictions in force under the above referred to Section 6 of the Act of July 2, 1940 (see 261-2; Ex. Order 8713, 6 FR 1502—see particularly par. 10; Export Control Schedule No. 2, 6 FR 1814) divided the various articles or materials affected thereby into a number of classes. The articles or materials were described by their usual or ordinary designations together with references to classification numbers in Schedule B of the Department of Commerce "Statistical Classification of Domestic Commodities Exported from the United States" (hereinafter referred to as "Dept. of Com. No.").

As to some of the commodities, the regulations granted "a general license" in respect to specified destinations; that meant that those classes of commodities were freely exportable to the named countries without any license. The exportation of other commodities or to other destinations was prohibited except under special license.

These regulations and schedules, as in force in March 1942, differentiated between, on the one hand,

> "platinum metal and alloys: bars, ingots, sheets, slabs, wire, sponge and other forms, including scrap", Dept. of Com. No. "6922", and "platinum manufactures, other than jewelry (including crucibles)", Dept. of Com. No. "6929",

and, on the other hand,

> "Jewelry
>
> Jewelry and other articles of solid gold or platinum to be worn or carried about the person (including

men's jewelry, women's jewelry, cigarette cases, pocket cigar and cigarette lighters, compacts, powder and vanity)—Dept. of C. No. 9620 * * *

Jewelry findings, parts and materials (specify by name)—Dept. of C. No. 9635".

No. 9620 in the Department of Commerce Schedule was described as "jewelry of solid gold or platinum" and No. 9635 was described as "jewelry findings, parts and materials".

"Findings" are the fabricated component parts of jewelry—the different parts which when put together form a piece of jewelry; for example, a ring consists of the following "findings": a band or shank, shoulders and a setting (78-9, 162-5; Respt's Ex. 2).

In so far as exportation to Brazil was concerned, "jewelry and other articles of solid gold or platinum to be worn or carried about the person * * * [and] jewelry findings, parts and materials" were in the "general license" class, freely exportable, whereas the export of platinum in bulk was prohibited except under special license.

The Acts and Facts Claimed To Constitute The Charged "Attempt to Export"

On March 20, 1942, in New York, petitioner delivered to the Railway Express Agency, Inc. a wooden box (Govt's. Ex. 14) containing 191 platinum wedding *rings* and 107 platinum engagement *rings* (Govt's Exs. 1-11, 15) for transportation to Miami, Florida, there to be presented to the Collector of the Port for inspection and clearance for export to Rio de Janeiro, and upon such clearance, to be transported, by air, by the Pan American International Air Express Service to one named Estrin at Rio de Janeiro, Brazil (1, 5, 6, 61-66; Govt's. Exs. 12, 12a, 14; 165-199).

The box was accompanied by the usual and required documents: a "Shipper's Export Declaration" and bill of lading (66-72; Govt's. Exs. 12, 12a). The former was on the form prescribed by the U. S. Department of Commerce. It specified the contents to be "jewelry" consisting of 191 "platinum wedding rings" and 107 "platinum engagement rings", Department of Commerce "Statistical Classification of Domestic Commodities Exported From the United States", Schedule B number "9620".

When the box of rings arrived at Miami, Florida, either the Railway Express Agency, Inc. or the Pan American International Air Express Service, in regular course, presented the merchandise and accompanying documents to the Export Control Officer in the Office of the United States Collector of Customs, for physical inspection and clearance (62-64). Upon examination of the contents, clearance was refused (63-64). *No attempt was made to carry the goods out of the country and no such attempt was expected* (65).

The Seizure And Subsequent Libel

Nevertheless, the Collector of the port thereafter seized the goods, and, thereafter, on April 2, 1942, procured a warrant of detention under 22 U. S. C. 402 (3, 471).

Thereafter, on June 1, 1942, the United States, purporting to act under 22 U. S. C. 404, brought this libel proceeding and procured a warrant of seizure and monition under which the United States Marshal took possession of the property from the Collector (69-73, 471).

After the seizure of the merchandise and before the institution of this libel proceeding, the Export Control Schedules were amended, effective April 28, 1942, so as to transfer platinum jewelry and platinum findings, parts and materials from the general to the special license class (6, 264). Thus the distinctions between those classes, for export control purposes, were abolished.

Overlooking the differentiation which existed at the time of seizure in the Export Control Schedules between platinum metal, on the one hand, and platinum jewelry, findings, parts and materials, on the other hand, the libel repeatedly and insistently describes the seized merchandise as "84.80 ounces of platinum" (1-2).

The Collector, however, in seizing the merchandise described and tagged them as "199 platinum wedding rings and 107 platinum engagement rings" (69-73, Govt's. Ex. 14), and at the trial the deputy U. S. Marshal identified the merchandise "as the wedding rings and engagement rings that were seized and turned over to us by the United States Customs" (70). Even Government's counsel offered them in evidence as "these rings" (60-61, 72-77).

The Fabrication of the Rings

All of the rings had been manufactured in the usual course (166-180).

In accordance with the usual and normal course of the trade and business, Mr. Cooper prepared the metal so that it was of the required width and thickness, and gave it to two stamping concerns who were regularly engaged in that business, the American Setting Company and the U. B. S., now known as the U. S. (166-180).

The American Setting Co. stamped out the engagement ring shanks and settings, using their stock standard dies. Then a jeweler, Tenen Bros., did the bending and joining with solder, and soldered the setting on to the shanks, using a standard solder composed of *palladium and gold* (167-170).

The U. B. S. stamped out the wedding bands, with stock standard dies, *in accordance with cataloged designs and of cataloged thickness and width.* "The thickness and width of a ring are determined by the die that is used in

stamping it"; the same die always produces a ring of the same thickness and width. These rings were ordered by catalog number and specification—in accordance with the designs and specifications set forth in the stamper's regular catalog which petitioner put in evidence (170-180; Respondent's Ex. 1). The catalog had been sent to Estrin, the consignee; he made the selections therefrom (193); Cooper complied. The conformity of the wedding bands to designs and specifications contained in that catalog was pointed out at the trial (178-180).

The stamping process results in unbent bands of uniform length, width and thickness, with designs thereon. The length is sufficient to make a ring of the largest size (172-174). The bands thus stamped out by the U. B. S. went also to Tenen Bros., who cut down the lengths of some of the bands in order to produce the usual assortment of sizes; then shaped them into round forms, and soldered the ends together to make the bands into rings. The soldering was by hand. Then the rings went to a polisher. The polishing was done on a polishing machine in the petitioner's premises, by a polisher whose name and address Mr. Cooper gave to the Government's investigators in 1942, and who was examined by them (174-177, 200).

After polishing, these rings were wrapped in the usual way, each design forming a separate group (177).

All of these rings were of the sizes usually made for stock, ranging from size 5½ to 10. Stock rings are manufactured "up until size 13, including rings for women" (180).

The rings then were in the condition in which they usually are sold to jobbers (183-4). From that point on, handwork was required to complete and perfect the rings to the requirements of the individual ultimate purchasers (90-93, 95-103, 180-185, 212-213, 220-221, 272, 277, 283-4, 288-294, 301, 304-6, 307, 315-320).

Mr. Cooper testified that he used unalloyed platinum because the consignee Estrin had specified pure platinum (193) and he attached no significance to that because he knew that in earlier years the practice in New York was to make rings of pure unalloyed platinum, and that it still is the practice in other countries, and even here pure platinum is being used for heavy wedding rings, brooches and for rings with colored stones, because such stones, being not as hard as diamonds, "cannot stand the pressure of the hard metal and is easier to set in pure platinum". Mr. Cooper himself personally made a lot of articles, big brooches and rings and some other ornamental jewelry out of pure platinum only", and "in different countries" jewelry presently is manufactured out of pure platinum (159-160, 193-196, 224-5; Respt's. Ex. 3 for Iden.); and petitioner's regular stock of rings and findings for domestic sale includes rings and findings of pure platinum (210; see also 291).

The Government's Assertions of "Fraud"

The Government sought to bridge the gap between, (a) the allegations of the libel that the goods in question were "84.80 ounces of platinum", the "exportation" of which was prohibited except under federal license whereas "no export license had been issued for the exportation of the said platinum" (1-2), and (b) the proof that the merchandise was not platinum in the restricted class but jewelry and "jewelry findings, parts and materials" in the general license class, by asserting that the goods, although objectively rings, nevertheless, were platinum because "these rings" were ordered, manufactured and shipped (according to the Government's unproved contentions) not for ultimate disposition as rings but with the intent that, after their arrival in Brazil and their sale in Brazil by Estrin, they would be smelted and thereafter used as platinum, and that petitioner's fabrication of the platinum into rings

was to fraudulently disguise the platinum as rings in a deliberate effort to evade the prohibition of unlicensed export of platinum metal.

In this connection, it is noteworthy that petitioner is a long established, substantial, reputable concern, of unblemished reputation, engaged, since 1913, in the business of smelting, refining and dealing in precious metals and of manufacturing and selling "findings" to the jewelry trade (152-6, 162-5, 209-210, Respt's. Ex. 2); that petitioner does business of three or four million dollars a year (154); that exporting was not part of their business, and they exported only in rare instances (228-9, 235-6); that these exports to Brazil were to Mr. Cooper's son-in-law, a young physician who went to Brazil to perfect himself in the treatment of tropical diseases and who, collaterally, was trying to do a little business out of which to defray his expenses, and these transactions were exclusively for Estrin's benefit (232-233; see brief at pages 43-7, *infra*).

The Trial Court's Finding of Forthrightness and Innocence

Mr. Joseph B. Cooper testified at the trial extensively and in great detail, and upon the entire record, the trial court found that he was "entirely forthright in the matter" and was "innocent of wrong intentions" (467-8).

Nevertheless, the trial court decreed the forfeiture of the merchandise by finding that the consignee thereof, Estrin ordered the merchandise "in the form of rings" to fill, in Brazil, orders by Brazilian jewelers for "platinum in bars", that Estrin's design and intent in Brazil were imputable to the petitioner because the court believed him to be "an agent" of the petitioner, and that the thus imputed design and intent as to the use to which the rings were to be put in Brazil made them, at the time of tender in Miami, the equivalent of "platinum in bars" (Id.).

The trial court held further that although the petitioner did nothing more than openly and in the regular course

present the merchandise to the proper government authorities to inspect and clear in accordance with law and had no intention to export the merchandise except in the event of and after clearance, such presentation constituted "an attempt to export" the merchandise and rendered the merchandise "about to be unlawfully exported" within the meaning of 22 U. S. C. 401.

The Opinions In Court of Appeals

The Court of Appeals was unanimous in affirming the trial court's finding of good faith on the part of the petitioner. "The question of good faith", says the majority opinion, "was properly an issue for the trial court, and we are not disposed to disturb his findings in this regard" (485); and the dissenting Circuit Judge comments: "Mr. Cooper was thus acquitted, but his property confiscated on a supposed agency of Estrin" (488).

Adopting also the trial court's conclusion that Estrin was the petitioner's agent and the trial court's findings as to Estrin's designs and intent and his conclusions as to the consequence thereof, a majority of the Court of Appeals affirmed the whole of the trial court's judgment.

Circuit Judge Sibley, on the other hand, after commenting that the "evidence is not in conflict, and the main facts not in dispute" (486) held that "the testimony" did not authorize "a finding of agency" (488) nor the finding against Estrin (490), and, in any event, "the use that may be made in the foreign country" was not "a factor in the regulations" (489-490). He added (491):

> "Not a one of the cases cited in the majority opinion touches the point. Nor do I find any relevancy of the cases cited to any question in this case."

Basis of Jurisdiction

This petition is presented pursuant to, and invokes this Court's jurisdiction under, 28 U. S. C. Section 1254, Subdivision 1 (Public Law 773—80th Congress).

The Questions Herein

Both of the opinions in the Court of Appeals stated that the case, in the main, rests on uncontradicted evidence.

The only conflict in the record, in fact, is in the "expert" testimony as to trade practices and nomenclature of respondent's "expert" jeweler, Carberry, and Mr. Cooper; and it is obvious from the trial court's findings that Mr. Cooper "was entirely forthright" and "innocent of wrong intentions" that he credited Mr. Cooper's testimony over that of Carberry in the respects in which there was a conflict.

Therefore, it is quite remarkable that there should be such a sharp conflict in the opinions in the Court of Appeals as to what the record contains.

There is, on the face of the majority opinion, an irreconcilable conflict between its acceptance of the trial court's findings of complete forthrightness and innocence of wrong intentions on the part of Mr. Cooper, and the statement that "the evidence * * * establishes that many of the wedding rings were so heavy, and of such gauge, size and composition, as to be practically unsuitable for refinishing into salable articles of jewelry * * * could not normally be sold and used as jewelry, and were not ordinarily suited for such purpose" (482). These statements are in direct conflict with Mr. Cooper's detailed testimony and the uncontradicted evidence of the course and process of the manufacture of these rings (as summarized above at pp. 6-8). If the

trial court had disbelieved Mr. Cooper's testimony, he would not have characterized Mr. Cooper as "entirely forthright" and "innocent of wrong intentions".

Therefore, in so far as the majority's affirmance of the judgment rests upon alleged intrinsic unsuitability or want of genuineness of the merchandise as "jewelry findings, parts and materials", it is contrary to the basic finding of the trial court which the affirming opinion expressly upholds.

Judge Sibley, on the other hand, also accepting the trial court's finding of good faith, came to the conclusion that the judgment was not "either just or according to law" (486). "I don't think the testimony authorizes a finding of agency", says he (488). Then after reviewing the testimony of "the government's witness Kalman", the only Rio de Janeiro jeweler (of the six whose depositions the Government took and presented), who testified to transactions with Estrin, Judge Sibley concluded that

> "If Dr. Estrin was an agent of Cooper, I do not think the export regulations were violated by Estrin's ordering out these rings, which required no export license, in the hope of selling them to this and other jewelers. The regulations expressly permit the free export of 'Jewelry findings, parts and materials', evidently intended not to break up the jewelry trade.
>
> Cooper testifies ' "Findings" ' means all parts required to make a jewelry not completed, separate parts unassembled'. These rings, viewed by all the judges, are such * * * Kalman says his use of such unfinished rings had become usual in Rio. He says also pure platinum was unusual, but he sold some of such rings he had received. The regulations say nothing about purity. Bulk platinum, pure or impure, requires a special license. Platinum jewelry, etc., pure or impure, does not. I do not think the use that may be made

in the foreign country is a factor in the regulations, but if it is, the use here contemplated was sale to jewelers in their jewelry business, the exported goods to be finished or otherwise used in the jewelry business. I see no violation of the license regulations in that" (489-490).

Petitioner confidently submits that a reading of the record will convince this court that Circuit Judges McCord and Walter misapprehended it and that essentially it is correctly summarized in the opinion of Circuit Judge Sibley.

On the basis of the majority's understanding of the record—misunderstanding, in the petitioner's view—there are presented the following questions of law:

1. Does the presentation of goods to an Export Control Officer, in regular course, for inspection and clearance for export constitute "an attempt * * * to export * * * in violation of law" and render the goods "about to be exported * * * in violation of law" within the meaning of 22 U. S. C. 401, where (a) the presentation of the goods and application for clearance are by a disinterested public carrier of good repute, (b) there is no conveyance or commencement of conveyance of the goods, and no attempt to physically carry them, out of the country, (c) the evidence shows that export was intended and would take place *only in the event of and after official clearance* in regular course and (d) shipment and activity to ship terminated (with finality) within the United States when clearance was refused?

2. Where an export control statute, or a regulation thereunder having the force of statute, distinguishes between metal in bulk and metal fashioned into finished or semi-finished items, parts or materials (and places the former in a restricted class, and the latter is permitted to be freely exported without license), is mer-

chandise, which, according to its objective character at the time of tender for export, falls into the unrestricted class of manufactures, taken out therefrom and put into the metal in bulk class by knowledge on the part of the exporter (whether imputed or direct) that the goods are wanted in the country of destination ultimately for their metal content and that after the arrival of the merchandise in the country of destination and the sale thereof of by the consignee in their shipped condition, it will, at some subsequent time, be reprocessed and converted into bulk?

3. In the face of the fact that Section 6 of the Act of July 2, 1940 is autonomously sufficient and specifies the sanctions for violation, does 22 U. S. C. 401, which was enacted in 1917, apply to a violation of that 1940 intrinsically complete statute?

Those are basic questions. If any one of them is answered in the negative, the judgment herein is indisputably wrong, even on the assumption that the record is properly and correctly summarized in the majority opinion.

In addition to those basic questions, the record (as read and construed by the Court of Appeals majority) presents the following questions special to this case:

4. Does the libel contain proper and sufficient allegations that, at the time of seizure, the goods were "about to be exported" when it alleges merely that the petitioner "did ship * * * *to Miami*" certain platinum which "was *offered* for export * * * *in an effort to export* or ship from, or take out of the United States of America * * * in violation of law *and with the intention* that said article be exported or shipped from or taken out of the United States * * *"?

5. Is the judgment herein secundum allegata in the face of the fact that the libel alleged the shipment and

offer for export of platinum and did not allege an attempt to violate the law by subterfuge and fraudulent evasion?

6. Is the evidence legally sufficient to warrant a finding that at the time here involved Dr. Estrin was an agent of the petitioner?

7. If yes, were Estrin's intent and design to violate the law (assuming he had such intent and design) imputable to the petitioner in the face of the rule of law that where an agent engages in fraud and illegality for his own benefit, as distinguished from his principal's, his fraud and illegality are not imputable to a principal who acts without knowledge thereof (see cases at pp. 48-50, *supra*)?

8. In the light of the rule that fraud and illegality are not to be lightly inferred but must be established by clear and convincing evidence, does the record contain legally sufficient evidence that Estrin's purpose in ordering these rings was to have them to sell as platinum and not as jewelry or jewelry "findings"?

Each of the above questions was duly raised, presented and argued in the trial court by motions at the opening of the trial, at the end of the government's case and at the end of the entire case (59-60, 148-152, 257-264). While the transcript of the record does not set forth in full the motions made at the commencement of the trial (59-60) and the motions made at the end of the government's case (148-152; cf. 257), the substance and content thereof were reiterated and expressly referred to in the motion made at the end of the trial which is recorded in full at pages 157-264 of the transcript. The petitioner's position in respect to those points was preserved by exceptions (59, 151, 469-470). All of those points were presented to, and argued before, the Court of Appeals.

Reasons for Granting the Writ

1. The first question mentioned above has never been passed on by this court nor, except in this case, by any other court.

That seizure under 22 U. S. C. 401 is warranted only when the goods are so much in the process of exportation that, but for the seizure, the goods would leave the country, was recognized in *Reynal* v. *U. S.*, 153 F. 2d 929 (C. A., 5th Cir.), *U. S.* v. *21 lbs. 8 ozs. of Platinum*, 147 F. 2d 78 (C. C., 4th Cir.), *U. S.* v. *200 Watches*, 66 F. Supp. 228 (S. D. N. Y., Kennedy, D. J.) and in *The Alice*, 78 F. Sup. 741 (D. C., Puerto Rico).

All of those cases support the petitioner's contention and point to the error of the judgment in this case (see pp. 22-31, *infra*).

However, they are not squarely in point.

The *Reynal* case was a decision on the pleadings.

The *21 lbs. 8 ozs. of Platinum* case, like most of the cases cited in the majority opinion (484, 486), was an instance of clandestine transportation which, but for the seizure, would have resulted in the goods passing beyond the border.

The *200 Watches* case is closer to the instant case; after an unlawful actual exportation, the vessel which was carrying the goods and also their owner were turned back prior to disembarkation and upon re-arrival at a United States port, the owner declared the goods, whereupon they were sealed and left on board the vessel where they remained until their seizure some weeks later purportedly in pursuance of 22 U. S. C. 401. The District Court held the seizure unauthorized because at the time thereof the goods were not "about to be exported", their export having been completely frustrated prior to seizure by an event other than the seizure and the effort to export thereupon

having been voluntarily abandoned. The government apparently recognized the correctness of that decision because the reports do not reflect any appeal therefrom.

In the *Alice* case, the District Court held that the Act did not authorize the seizure of a vessel several months after the removal therefrom, by seizure, of the goods which were to have been illegally exported, since at the later time there was no imminence of violation.

2. The second question mentioned above, like the first question, has never been passed on by this court, nor, except in this case, by any other court.

However, essentially the same question has arisen under the traiff acts and invariably it was held by this court that classification depended upon, and was controlled by, the objective character of the goods at the time tendered for entry regardless of the motivation and intent of either the foreign shipper or the domestic importer or the prior or subsequent history of the goods (*Magone* v. *Heller*, 150 U. S. 70; *Magone* v. *Wiederer*, 159 U. S. 555; *U. S.* v. *Citroen*, 223 U. S. 407; *Seeberger* v. *Farwell*, 139 U. S. 608; *Magone* v. *Luckemeyer*, 139 U. S. 612).

The parallel between import schedules and classifications, on the one hand, and export schedules and classifications, on the other, seems to petitioner complete and irrefutable. Therefore, while the precise point here involved has not been determined, the judgment herein—on logic, principle and controlling analogy—seems irreconcilable with the authoritative decisions of this court just referred to.

3. The third question mentioned above, likewise, has never been passed on by this court, although several of the Courts of Appeals have ruled that the 1917 enactment embodied in 22 U. S. C. 401-8 applies to a violation of Section 6 of the Act of July 2, 1940 and that the remedies

and sanctions under the former are cumulative to those contained in the latter (*U. S.* v. *1940 Dodge Truck,* 165 Fed. 2d 211, C. A., 5th Cir.; *Reynal* v. *U. S. supra,* C. A., 5th Cir.; *U. S.* v. *21 lbs. 8 ozs. of Platinum, supra,* C. A., 4th Cir.; and *U. S.* v. *Morachis,* 154 F. 2d 918, C. A., 9th Cir.). There are, in addition, District Court decisions to the same effect, which are cited in the Court of Appeals decisions just referred to. The question, however, is open in this court.

In respect to the above three questions of exclusively federal law, it is submitted that they are important questions of federal law which have not been, but should be, decided and settled by this court.

4. In addition, it is respectfully submitted that the determination, adverse to the petitioner, of the other five questions listed above (questions 4-8) constitute such departures from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision to the end that an injustice to the petitioner may be cured and avoided.

In that connection, it is respectfully urged that the material facts of this case, as established by the evidence and viewed in the light of the trial court's determination of the credibility of such thereof as he heard from witnesses who appeared and testified before him, are correctly summarized in the dissenting opinion of Sibley, C. J., and that, on the basis of the facts as thus summarized, it seems impossible to do anything but agree with him that the judgment herein is neither "just" nor "according to law", because (a) the petitioner did nothing that "the regulations" did not "expressly permit", (b) the alleged wrongdoing attributed to Estrin was not established, and, (c) even if established, his intent, purpose and knowledge were unknown to the "entirely forthright" and "innocent" petitioner and are not imputable

to it for the dual reason that (i) the testimony does not authorize a "finding of agency" and (ii) as a matter of law, a principal is not chargeable with fraud or criminality which an agent, without his principal's knowledge or assent, perpetrates in the service of his own (the agent's) personal ends and exclusively for his own interest, advantage and profit (see cases at pp. 48-50, *infra*).

Were this an ordinary dollar and cent controversy, involving nothing but a sum of money, the modesty of the amount involved ($6,449.50) perhaps would discountenance a review by this court of such of the questions herein as are special to this case. This, however, is a proceeding under a criminal statute—a war statute, to boot—and a judgment of forfeiture implies and casts grave reflections on the character and the patriotism of men whose careers and records otherwise stand unsullied. If the judgment is wrong—if, as held by Sibley, C. J., it is neither "just" nor "according to law"—good repute is too precious—as a matter of sacred and commendable pride, and, also, sound business—to be allowed to be stained and undermined by the suffering of the judgment to stand.

Petitioner respectfully appends a brief in support of this application to set forth a more detailed consideration of the aforementioned points of law and the evidence and cases bearing thereon.

Prayer

Wherefore petitioner respectfully prays that this petition for a writ of certiorari to review the complained of judgment be granted.

Dated, New York, July 12, 1949.

JOSEPH B. COOPER & SON, INC.,
By COPAL MINTZ,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

JOSEPH B. COOPER & SON, INC., as Owner of 84.80 Ounces of Platinum,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF THE FOREGOING PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Since the foregoing petition contains an adequate statement of the opinions below (pp. 2, 9-13, *supra*), the basis of jurisdiction (p. 11, *supra*), summary of the facts (pp. 2-11, *supra*) and a recital of the questions involved (p. 11-15, *supra*), those matters are hereby included by reference, and this brief proceeds directly to the argument of the points of law which petitioner believes have been erroneously decided in this case.

Summary of the Argument

POINT I: No law was violated by the tender of the merchandise for inspection and clearance in due and regular

course. Such submission did not constitute "an attempt" to export in violation of law, where, as here, there was no intent or arrangement to export unless and until clearance was duly granted (pp. 22-30).

POINT II: Appellant's motion to dismiss the libel for insufficiency on its face (R. 59-60, 151-2, 257-264) should have been granted because the libel fails to allege or show that the goods were about to be unlawfully exported (pp. 30-31).

POINT III: At the times here involved there was no prohibition of the export of the seized goods, and no license for the export thereof was required:

A. The goods, objectively, were "jewelry" or "jewelry findings, parts and materials" (pp. 32-3).

B. Neither intent, purpose, expectation or knowledge (assuming their existence) unprocessed or reprocessed the rings to mere platinum in bulk, or otherwise changed their classification. Expected reprocessing after arrival in Brazil did not make the goods at Miami what they would be after such later reprocessing in Brazil (pp. 34-42).

POINT IV: The evidence, as a matter of law, does not warrant holding consignee Estrin's alleged intent or purpose or expectation as that of the consignor (the petitioner), who was "entirely forthright" and "innocent of wrong intentions", on the theory of agency:

A. The evidence does not warrant and does not support the finding of agency (pp. 43-7).

B. Even if Estrin were an agent, his fraud and illegality (if there were any) were not within the scope of his agency and were in the service of his own ends and, therefore, as a matter of law, not imputable to the petitioner (pp. 48-51).

POINT V: There is no evidence that Estrin had the intent and purpose attributed to him by the decisions below (pp. 51-6).

POINT VI: There is a fatal variance between the allegations of the libel and the theory of the judgment (pp. 56-7).

POINT VII: In any event this proceeding was unauthorized because 22 U. S. C. 401 does not apply to a violation of Section 6 of the Act of July 2, 1940 (pp. 57-8).

I

No law was violated by the tender of the merchandise for inspection and clearance in due and regular course. Such submission did not constitute "an attempt" to export in violation of law, where, as here, there was no intent or arrangement to export unless and until clearance was duly granted.

A. The relied on Statutes

This proceeding was predicated, and the judgment rests, upon two statutes. The claim here is that there was a violation of Section 6 of the Act of July 2, 1940, entitled "An Act to expedite the strengthening of the national defense" (54 Stat. 712, 714, 50 U. S. C. 701); and the remedy here pursued, and granted by the courts below, is claimed to be authorized by the Act of June 15, 1917, 22 U. S. C. 401 *et seq.*

Section 6 of the Act of July 2, 1940 reads in full as follows (emphasis supplied):

> "Sec. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equip-

ment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies necessary for the manufacture, servicing, or operation thereof, he *may by proclamation prohibit or curtail such exportations,* except under such rules and regulations as he shall prescribe. Any *such proclamation shall describe the articles or materials included in the prohibition* or curtailment contained therein. *In case of the violation* of any provision of any proclamation, or of any rule or regulation, issued thereunder, *such violator or violators, upon conviction shall be punished by a fine of not more than $10,000.00 or by imprisonment* for not more than two years, or by both such fine and imprisonment. The authority granted in this section shall terminate June 30, 1942, unless the Congress shall otherwise provide."

The Presidential Proclamations in force in March 1942 provided that certain articles and materials therein designated "*shall not be exported* from the United States except when authorized in each case by a license as provided for" in the proclamations. They provided further that in respect to such licensed exportation "the original license must be presented *prior to exportation* to the Collector of Customs at the port through which the shipment authorized to be exported is being made (Ex. Order 8713, pars. 1, 7, 10, 6 FR. 1502).

The relied on 1917 statute (22 U. S. C. 401) reads, in full, as follows (emphasis supplied):

"§ 401. *Seizure of war materials intended for unlawful export generally; forfeiture.* Whenever *an attempt is made to export* or ship from or take out of the United States any arms or munitions of war, or other articles, *in violation of law*, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, *are being*

or are intended to be exported, or shipped from, or taken out of the United States, *in violation of law,* the several collectors, comptrollers of customs, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, *may seize and detain any articles* or munitions of war *about to be exported* or shipped from, or taken out of the United States, *in violation of law,* and the vessels or vehicles containing the same, and retain possession thereof until released or disposed of as directed in sections 402-408 of this title. *If* upon due inquiry as provided in such sections *the property seized shall appear to have been about to be so unlawfully exported,* shipped from, or taken out of the United States, the same shall be forfeited to the United States." [June 15, 1917, ch. 30, title VI, § 1, 40 Stat. 223; June 17, 1930, ch. 497, title IV, § 523, 46 Stat. 740.]

B. There was no exportation here

Unless there was an exportation here, the Act of July 2, 1940, cannot be said to have been violated, for nothing else was prohibited by or under it.

Was there an exportation? What was exported? When? Where or from where? To where?

The plain and clear fact is that there was no exportation—no exportation at any time, at any place, from any place, to any place—and no attempt to export.

There was nothing more than a submission of goods to a proper government official, the export control officer, for his authorization of the export—an application to the duly constituted authorities for leave to export without a special license. What wrong-doing was there in that?

That there was nothing more than that is clear from the allegations of the libel and from the Government's evidence.

The libel charged that the goods were "offered for export" and that "application for clearance" of the goods "was requested of the Collector of Customs" without the presentation of an export license when, according to the libel, the goods were not exportable except under license (1-2). The libel contains no allegation of actual export or of an attempt physically to carry out the goods or of a design to have them carried out without clearance or despite the denial of clearance.

That there is no such claim is made clear by the Government's evidence.

That evidence was that the box of rings (Govt's Ex. 14) was presented either by the Railway Express Agency or the Pan American International Air Express "in the ordinary course of business" with the customary two documents, the Shipper's Export Declaration and a way bill or bill of lading (Govt's Exs. 12 and 12a) "for passing upon" (62-63). The box itself was presented for opening and physical inspection (64), and "the regulations and the practices called for examination and inspection" as a condition precedent to clearance (64). *The Deputy Clerk of Customs, as a government witness,* testified (65):

> *"The Pan American and other carriers would not attempt to make a shipment until a customs officer had first passed upon this export declaration."*

Can it be said that the law was violated by the mere presentation of the goods to the Collector?

There is no charge or insinuation that any bribery was intended or that there was any attempt to exercise any influence upon the Collector or any of his deputies.

As already pointed out, the Act prohibited nothing other than exportation. None of the proclamations or regulations in implementation of the Act undertook to prohibit mere application for clearance without a license, where a license was required.

C. There was no attempt to export; the goods were not "about to be unlawfully exported"

Nor does 22 U. S. C. 401 apply to a mere submission of goods to a Collector for his inspection and clearance—assuming that that 1917 statute applies to the Act of July 2, 1940.

It is significant that *in every case* mentioned in the majority opinion (484, 486)—with the single exception of the District Court case of *U. S.* v. *67,200 pounds of Lithopone*, 54 Fed. Sup. 895, which discusses neither of the statutes here involved and does not appear to have proceeded under either—*the "attempt to export" was by smuggling.* In each of those cases the goods were concealed in an automobile or truck about to be driven across the border by operators who declared that their vehicles contained no goods. Here, in contrast, the goods were not about to be carried out of the country; there was to be no clandestine or secretive transportation; the goods were in the hands of a public carrier to be handled in a public way; whether the goods would go out of the country or stay here depended upon their being officially cleared after inspection and consideration by the authorities; and, after clearance was denied, their destination was back to New York. *It was when the goods were destined for their return to New York, that the seizure took place.*

Under 22 U. S. C. 401 (quoted at pp. 23-4, *supra*) there must be an actual exportation or an actual attempt to export; it applies only "whenever *an attempt is made to export* or ship from or take out of the United States * * * *in violation of law*", or where goods "*are being or are*

intended to be exported or shipped from or taken out of the United States *in violation of law''*; and *property may be seized only when it is ''about to be exported or shipped in violation of law''*, and may be forfeited to the United States only ''if upon due inquiry * * * *the property seized shall appear to have been or about to be so unlawfully exported,* shipped from or taken out of the United States.''

The petition herein (at pp. 16-17, *supra*) refers to the Court of Appeals and District Court cases which recognize that under that statute seizure is warranted only when the goods are so much in the process of exportation that, but for the seizure, the goods would leave the country.

Thus, in *U. S.* v. *21 lbs. 8ozs. of Platinum* (147 Fed. 2d 78), the Circuit Court for the Fourth Circuit said that seizure was authorized only when made ''to frustrate an existing intent or attempt to export * * * illegally''.

Of the cases cited in the petition, it may be worthwhile to make further reference to *U. S.* v. *200 Watches,* 66 Fed. Sup. 228. The District Court judge in that case said that

> ''action by the Customs authorities is warranted only when the offending goods '*are* being or are intended to be exported' or '*about to be exported* or shipped from or taken out of the United States'. The attempt which is denounced is one which '*is* made to export or ship from or take out of the United States' the property seized * * *'' (emphasis, the Court's).

Hence, when the goods were clandestinely taken on board a vessel which was about to depart from Los Angeles and which actually did sail on October 20, 1945, the goods, at that time and place, ''were subject to seizure'', but not so after the vessel had been turned back and the owner of the goods declared the goods for re-entry into the United States. At that point, said the District Court judge, it was ''equally clear'' to him that

"there was no present attempt to export, and the goods were not 'about to be exported'. (See Webster's New International Dictionary, Second Unabridged Edition, p. 7, where 'about to' is defined as 'on the point or verge of' or 'in the act of'.) The illicit design had been frustrated, a fact which the petitioners voluntarily acknowledged when they declared the seized property on their return to continental United States. At that time, the attempt had terminated, and petitioners had become reconciled to the fact that they could not export these articles. From that point on, even under the most liberal construction of the statute the goods were not the subject of seizure because they were not 'about to be exported'."

In the instant case, the seized goods never were at the point or verge of, or in the act of, exportation. There was a condition precedent to appellant's intent to export—a condition precedent which never was realized—the granting of clearance. *The Government's evidence* (65) *that there would be no "attempt to make a shipment until a customs officer had first passed upon this export declaration" makes clear that, at the point of submission of goods for physical inspection and clearance, the goods were not "about to be exported".* The application for authorization to export was not an attempt to export but precedent thereto. *The process of exportation would have commenced only in the event of and after clearance.*

D. The claimed "fraud" in making up the rings thereby to ship, under the general license, platinum which required a special license, did not constitute the presentation for inspection and clearance an "attempt to export"

Apart from the fact that the libel did not charge an attempt to export through trickery or fraud but the mere

tender for inspection and clearance, without an export license, of "84.80 ounces of platinum" which required a license, it is submitted that if, in fact, the goods were not in the course of a transit which, but for the seizure, would have resulted in their leaving the United States, no amount of trickery or fraud *antecedent* thereto is material to the determination of whether or not there was "an attempt to export" and whether the goods were "about to be exported".

Here it was not the seizure which frustrated export. The intent to export had ended before. If the goods had not been seized, they would not have left the country just the same. Under the established facts, the possibility of export ended when clearance was denied. Clearance was a condition precedent. The refusal of clearance took the goods out of the course of transit; it ended the transit—and the transit was abandoned—at a point antecedent and precedent to the commencement of export.

Fraud is not synonymous with "export". Those terms are not interchangeable. The concepts denoted by those words are not equivalents.

The words used in the statute—"to export", "to ship", "to take out"—are all words of physical movement.

Had clearance been granted and the goods thereafter had been started on their way out by being loaded on a plane or otherwise, then there would have been an attempt to export and the goods would have been about to be exported. If in those circumstances it were argued that the law was violated by the procurement of clearance through trickery the argument would be made in a case—unlike this one—where the goods actually and physically were on the way out and would have gone out if they had not been seized.

That is not the case here. This case stopped at the point of application for clearance. That was the intended ter-

minal, in the absence of clearance. The goods were to go no further. That was the actual terminal. If, in fact, the application was fraudulent, some statute perhaps applied, but neither the application nor the alleged trickery constituted physical exportation or attempt at physical exportation or the equivalent of physical exportation.

As was argued in behalf of the petitioner in the trial court, misrepresentation to the Collector, "if proved, may be fraud, or perjury, or some other crime, but it is not exportation. Exportation is an act. Words, whether true or false, cannot constitute exportation or attempted exportation" (259).

II

Appellant's motion to dismiss the libel for insufficiency on its face (R. 59-60, 151-2, 257-264) should have been granted because the libel fails to allege or show that the goods were about to be unlawfully exported.

The libel in this case is more gravely defective than the libel in *Reynal* v. *U. S.*, *supra*, 153 Fed. 2nd 929. In that case the court refused to regard an allegation that the seizing officer had cause to believe that the goods were about to be unlawfully exported as a factual allegation that the goods were about to be unlawfully exported. Here there is neither allegation of the fact nor that there was cause to believe that the goods were about to be exported.

The libel (1) alleges that on March 20, 1942 the appellant in New York

> "did *ship* by Railway Express Agency *to Miami*, Florida, 84.80 ounces of platinum, which said platinum was *offered for export* by Pan American Air Express Service via air in Miami, Florida, *in an effort to export* or ship from, or take out of the United States

of America the said article, in violation of law and with the intention that said articles be exported or shipped from or taken out of the United States of America in violation of law."

Certainly the shipment from New York to Florida was not an act of exportation or attempt at exportation.

The allegation that the goods were "offered for export", obviously is not an allegation of exportation or of an attempt to export. An *offer* for export is not equivalent to an *attempt* to export.

The further allegation that the offer was made "in an effort to export" is not, it is submitted, an allegation of, or equivalent to, the required allegation that the goods were about to be unlawfully exported.

Under the statute, it is not enough that there should be "an effort to export"; the "effort" must reach such a point of fruition that the goods are "about to be exported"; the effort must be translated into achievement to the point of where the goods are in the process of going out and would go out if not seized.

A mere "offer for export" in the pursuit of "an effort to export", without any degree of success, is not "an attempt" to export; it does not place the goods in the condition of where they are "about to be exported".

The defect in the libel was not due to faultiness of draftsmanship. It is due to the substantive deficiency of the case, for what the libel refers to as an "offer for export" in an "effort to export" was nothing more than a submission of the goods to an Export Control Officer, in regular course, for physical inspection and official authorization of export, without intention to export in the absence of such authorization.

III

At the times here involved there was no prohibition of the export of the seized goods, and no license for the export thereof was required.

A. The goods, objectively, were "jewelry" or "jewelry findings, parts and materials"

Because the law as laid down in the Export Control Schedules required a license for platinum in bulk but permitted the free export of platinum "jewelry" and "jewelry findings, parts and materials", the libel, to state a cause of action, described the goods as "84.80 ounces of platinum", the export of which "said platinum was prohibited except under Federal license" (1, par. 1; 2, par. 3; 3 pars. 7, 9).

But neither the evidence nor the court's findings support that description.

As pointed out in the petition (at pp. 5-6, *supra*), the Customs Officer who seized the merchandise described it as "199 platinum wedding rings and 107 platinum engagement rings" (70-73; Govt's Ex. 14 and tag thereon); the United States Marshal who executed the writ of seizure and monition and thereafter kept the goods in his custody and produced them at the trial described the merchandise as consisting of "wedding rings and engagement rings" (70-73); the Government's counsel introduced the merchandise in evidence as "these rings" (60-61, 72-3).

These rings were manufactured in the usual and regular course of that branch of the jewelry business, by reputable stampers and jewelers regularly engaged in that business, in accordance with their standard and ordinary practices and procedures, with standard dies, and the rings were of standard designs, widths, thicknesses and sizes (see *supra* at pp. 6-8).

Every witness who was interrogated on the subject referred to the merchandise as rings and not platinum (80, 97, 196-7, 268-272, 277, 281-4, 288-294, 301, 304-6, 307, 315-320). No one can look at the goods and refer to them as mere platinum metal.

The trial court found the merchandise to be "rings" (467).

In so holding, the court overruled the Government's contentions predicated on the fact that the rings were made up of pure platinum and the wedding rings were not completely finished and ready to wear but required further workmanship.

The trial court overruled the latter contention because the evidence showed that, in the regular course of trade, rings manufactured for sale to jewelers are left unfinished so as to allow for completion after the choice and setting of the stones (89-94, 95-97, 183-5, 212-213, 220-221, 272, 277, 284, 293, 301, 304-6, 316, 320).

The contention predicated upon the purity of the platinum was overruled because the evidence showed that in foreign countries rings are made of pure platinum as they had been in this country some years ago and as to some extent they still are (92, 98, 100-1, 121-3, 130, 159-160, 193-196, 210, Respt's Ex. 3 for iden., 224-5, 291, 322-6, 340).

Under the export schedules, the description and classification of the goods did not depend upon the presence or absence of alloy. Platinum in bars, etc., however much alloyed, required a special license. Platinum jewelry or jewelry findings and parts, on the other hand, were in the general license class irrespective of the degree of purity. It is to be noted, however, that under other laws or regulations, the term platinum, without qualification, may not be applied to any metal which contains less than 95% platinum (158-9).

B. Neither intent, purpose, expectation or knowledge (assuming their existence) unprocessed or reprocessed the rings to mere platinum in bulk, or otherwise changed their classification. Expected reprocessing after arrival in Brazil did not make the goods at Miami what they would be after such later reprocessing in Brazil.

Even if it were the fact that these rings, to the knowledge of the petitioner, were intended for smelting into platinum after their importation and resale in Brazil, it is submitted that such a purpose or intent would not make of the rings platinum metal or convert the rings into platinum metal.

Put another way, whether the goods fell into one class or another of the Schedules depended upon their objective character at the time of exportation and not on what would be done with the goods after they were exported from this country and were imported into another country and there sold by the consignee.

These rings could be used as platinum not by a mere mental process but only after physical change brought about by the use of machinery, heat and labor.

When tendered for export, merchandise cannot be said to be that which it will be after reprocessing abroad.

Is not this self-evident?

It may be argued that smelting is a simple process. But that certainly was known to the government authorities who promulgated the schedules embodying the distinctions. If, from a practical point of view—if from the standpoint of the purposes and objectives of the export controls and restrictions—the differentiation was foolish, that was the error of the Government. The authorities must be held to have known that it is very easy to smelt platinum jewelry into platinum and that that is

virtually a daily process (see 155-6). If the intent of the regulations was to keep as much of the platinum in this country as possible or to keep platinum from getting into the hands of persons outside of the country, then the authorization of the unrestricted export of platinum jewelry and of platinum jewelry parts was a blunder indeed.

But is the individual citizen to be held to account for not being more circumspect than the experts in the government? Is he to assume that, because they may be unrealistic, the distinctions which they deliberately lay down are not dictated by good and sufficient considerations which may be unknown to him and should not be observed by him? Is a citizen to be adjudged a law breaker and have his property forfeited because there was lack of discernment and lack of wisdom in the law which authorized him to do precisely what he did do?

It is a significant circumstance in this case that several weeks after the refusal of clearance and the later seizure by the Collector, the Export Control Schedules were changed by transferring the jewelry and jewelry findings, parts and materials from the general license schedule to the same schedule as platinum metal. That became effective midnight April 28, 1942, and notice thereof was given to the Collectors of Customs by circular dated April 14, 1942 (see 6-7, 264).

It goes without saying that the change could not be given retroactive effect so as to make illegal a tender of a shipment or a shipment, in the latter part of March 1942, more than a month before the effectiveness of the amendment.

The argument that intent or purpose alters the objective character of a commodity or an article, when made in the application of the tariff laws, always has been overruled (cases cited at p. 17, *supra* and discussed *infra*).

The analogy of the tariff cases to this case is absolutely complete. The parallel between an import law and an

export law seems irrefutable. Moreover, the Export Control Schedules themselves followed and adopted, and were correlated with, differentiations and classifications long in use by the Department of Commerce in cataloging the exports of the country.

The distinction between jewelry or jewelry parts and the metal of which it is or they are made, is common to the tariff laws and statistical export schedules of the Department of Commerce. Those schedules already have been referred to (pp. 3-4, *supra*).

Similarly, under the tariff law "platinum, unmanufactured or in ingots, bars, sheets or plates not less than one-eighth of an inch in thickness, sponge, or scrap" is on the free list (19 U. S. C. 1201, schedule 16, par. 1744), whereas "jewelry, commonly or commercially so known, finished or unfinished (including parts thereof) * * * composed wholly or in chief value of gold or platinum, or of which the metal part is wholly or in chief value of gold or platinum" is subject to an 80% *ad valorem* duty (*id.*, sec. 1001, par. 1527a).

It is clear from the tariff schedules and the Department of Commerce statistical schedules, that the differentiation between precious metal and articles or parts of articles made thereof is an old one and a traditional one and an important one.

It is manifest that the administrators of the Export Control Law carried those differentiations and distinctions into the export control schedules.

Of necessity, differentiations often are nice and fine; but they are written into law to make differences and to be observed and abided by. Whether provident or improvident, unambiguous statutory law, and regulations having the force of law, must be applied and enforced as written and not as some law enforcing agent may believe it should have been written (cf. *Anderson* v. *Wilson*, 289 U. S. 20, 27).

The controlling consideration here is that the Schedules deliberately distinguished between platinum metal and platinum jewelry or jewelry findings, parts and materials. And all that is urged here is that a gross injustice has been done in the prosecution of this proceeding and in the decision of this case as if the distinction did not exist or was meaningless or could be nullified by the intent or purpose of someone in Brazil.

It is obviously unsound to maintain that those schedules contemplated classification according to the intent or possible or expected use in the foreign countries and not according to objective character at the time of export. *If such was to be the basis of classification, the rules and regulations could have and would have so provided.*

A homely illustration, urged upon the trial court, makes clear the point (263-4):

> "* * * a cow does not cease to be a cow because the consignee is going to slaughter it. Until the time of slaughter, that animal is a cow and not beef. With respect to these items, if at the time of preparation for export they were jewelry or they were jewelry findings, parts, and materials, the intent or purpose which the consignee may have had as to the use to which he would put those items after getting them there, does not change their objective character."

In *Magone* v. *Heller*, 150 U. S. 70, this Court held that the applicability of a tariff provision "to substances expressly used for manure" "*cannot * * * be tested by the intention of the importer, or by the use to which the goods afterwards are actually put * * **". The question whether the imported articles come within the description is to be determined at the time of importation."

In *Magone* v. *Wiederer*, 159 U. S. 555, this Court said that the use to which an article may be diverted "*could not * * * change its tariff nomenclature*".

United States v. *Citroen*, 223 U. S. 407, is strikingly in point. The question there was whether certain pearls came within the *jewelry* paragraph which expressly included "pearls set or strung" *or the pearl* paragraph—"pearls in their natural state, not strung or set"—of the 1897 tariff. "The pearls", says the opinion, "had been purchased by the importer's brother and had been offered for sale, collectively and in lots, in Paris, London and Berlin * * * they had been strung from time to time on a silk cord. * * * Mrs. Leeds, the present owner, had seen the pearls in Paris, both loose and on a string. * * * 'It was strung up at odd times, then it was taken apart and other pearls were put in and others taken out, so it was strung several times'. She was permitted to wear the pearls as a necklace; and finally bought them, it being agreed that they should be delivered to her in this country." They were shipped "divided into five lots, separately enclosed." After their delivery here to Mrs. Leeds, she "added six pearls and formed the necklace she desired".

In holding that these pearls were subject to 10% duty as "pearls in their natural state, not strung or set" and not to 60% duty "as jewelry and parts thereof, finished and unfinished not specially provided for in this Act, including * * * pearls set or strung" this Court said (emphasis supplied):

> "First, the rule is well established that 'in order to produce uniformity in the imposition of duties, the dutiable *classification* of articles imported *must be ascertained by an examination of the imported article itself*, in the condition in which it is imported.' * * * When it is found that the article imported is in fact the article described in a particular paragraph of the tariff act, an effort to make it appear otherwise is simply a fraud on the revenue and cannot be permitted to succeed. Falk v. Robertson, 137 U. S. 225, 232. But when the article imported is not the article described

as dutiable at a specified rate, *it does not become dutiable under the description because it has been manufactured or prepared for the express purpose of being imported at a lower rate.* Merritt v. Welsh, 104 U. S. 694, 704; Seeberger v. Farwell, 139 U. S. 608, 611. 'So long as no deception is practiced, *so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred.*' Merritt v. Welsh, supra. The inquiry must be: Does the article, as imported, fall within the description sought to be applied?

In the paragraph as to jewelry (434) Congress expressly defined what pearls were to be included. The paragraph reads, 'including * * * pearls set or strung.' It does not say pearls that can be strung, or that are assorted or matched so as to be suitable for a necklace, but pearls 'set or strung.' *We are not concerned with the reason for the distinction; it is enough that Congress made it.* Had these pearls never been strung before importation, no one would be heard to argue that they fell directly within the description of paragraph 434 because they could be strung, or had been collected for the purpose of stringing or of being worn as a necklace. *Loose pearls—however valuable the collection—however carefully matched or desirable for a necklace—are not 'pearls set or strung'.*

Nor can it be said that pearls, imported unstrung, are brought within the description of paragraph 434 because, at some time, or from time to time, previous to importation, they have been put on a string temporarily for purposes of display. *The paragraph does not use a generic definition which could be deemed to define pearls previously strung though imported unstrung,* but *refers—in terms which shelter no ambiguity —to their condition when imported.* * * * the imported pearls, whether regarded separately or taken as a collection, are not within the description. *It is idle to*

comment on the relative value of a string to hold the pearls, for this is immaterial. The statute has furnished the test and we are not at liberty to make another.''

This Court held further that the fact that the pearls were pierced and thus prepared for stringing did not mean that they were no longer "in their natural state" within the meaning of the tariff paragraph. The phrase "pearls in their natural state, not strung or set" implies the inclusion of "pearls that can be strung or set, and pearls cannot be strung unless perforated". Therefore the used words "do not exclude, but embrace pearls that have been pierced, provided they are unstrung and unset".

That decision reviews earlier adjudications that various collections of pearls were admissible at the lower rate simply because they were not on a string. Those included pearls which "were imported in a Morocco case, with silk lining, forming a groove running lengthwise, in which the pearls were placed and by which they were held; * * * they were all matched and assorted * * * and arranged in a graduated order", as they would be as a necklace, "and when the boxes were opened gave the appearance of necklaces". Another instance was the importation of 85 pearls "carefully selected, matched and assorted, and in fact, are said to have been strung, and require only to be restrung to form a necklace". Another instance was a set of pearls which were selected to conform to specifications of a necklace, and which were shown on a sketch of the necklace as it would appear when the pearls were strung together, and which, in fact, had been temporarily strung one or more times to show how the string of pearls would appear as a necklace.

In *Seeberger* v. *Farwell*, 139 U. S. 608, 6% of cotton was introduced in the manufacture of woolen dress goods, solely for the purpose of bringing them under the "part wool"

tariff classification, the duty on which was considerably lower than that on pure wool goods. The process of manufacture was such and the quantity of cotton was so inconsequential that the cotton could not be detected without a careful examination. It cost slightly more to manufacture the goods with such mixture than it would to make them all wool. The admixture of the cotton for the sole purpose of procuring a lower duty was looked upon by the collector of customs "as an attempt to defraud the revenues". This Court, however, "concurred" in the holding of the trial court that:

> "Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition, in order to secure such lower rate of duty * * * manufacturers and importers had the right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate." The plaintiffs had "the legal right * * * to bring their goods within the operation of the clause involved, by the admixture of even a small percentage of cotton, if they could do so."

The same holding was made in the case of *Magone* v. *Luckemeyer*, 139 U. S. 612, where the admixture of cotton was only from 1.99% to 4.47% and "in appearance, texture, quality and use the goods were not distinguishable from women's dress goods composed wholly of wool, and the cotton in them could be discovered only by chemical analysis." This Court held that the trial court properly excluded as immaterial the proffer of proof that "the goods in question were bought and sold in this country as all wool goods", and approved the trial court's instructions to the jury that:

"the plaintiffs were not prohibited from so manufacturing goods so as to conform to the lower rather than the higher exaction of the tariff; and that *although they might have adopted a very technical device to escape the higher rate,* the question presented by the case was only whether their goods were embraced within the higher rate and not whether they had *evaded the law.*"

This Court also approved the trial court's *refusal to charge* that "if the quantity of cotton introduced into the goods was so insignificant as not to alter the character of the goods and remove them from the category of all wool dress goods, as known in trade and commerce" the importer should be required to pay the duty on all wool goods.

Attention already has been drawn to the fact that platinum is on the tariff free list, whereas platinum jewelry "finished or unfinished (including parts thereof") is subject to an 80% *ad valorem* duty. If these rings were being imported, would the Government admit them duty-free "as platinum, unmanufactured * * *"? And if the importer testified that while the merchandise had gone through a number of manufacturing processes and had the appearance of rings and could be used as such, nevertheless, it was his purpose to melt them and use them only as metal, would the Government regard that testimony as metamorphosing the rings into mere platinum? Is there any doubt that the government would insist upon a duty of 80% *ad valorem* and treat as fraudulent a declaration of the rings as platinum?

If on importation it would have been fraudulent to declare the rings as platinum, was it fraudulent, on export, to declare them as rings and not platinum?

IV

The evidence, as a matter of law, does not warrant holding consignee Estrin's alleged intent or purpose or expectation as that of the consignor (the petitioner), who was "entirely forthright" and "innocent of wrong intentions", on the theory of agency.

A. The evidence does not warrant and does not support the finding of agency

The facts of the relationship between the consignee Dr. Estrin and the appellant appear exclusively in the testimony of Mr. Cooper. They are as follows:

Dr. Estrin, a practicing physician, married Mr. Cooper's daughter at the end of 1940 (185-6). Two months later, Dr. Estrin and his wife (Mr. Cooper's daughter) went to Brazil (186-8). They stayed there until May, 1942 (187-8). Late in 1946 or early 1947, about six months before the trial herein, they were divorced (243).

When Dr. Estrin went to Brazil (in 1941, shortly after his marriage to Mr. Cooper's daughter), it was to study certain tropical diseases under the supervision of an eminent specialist (188-9). He did not go there to represent the appellant or to do business for the appellant (189-190):

> "Q. Prior to his going there, did you ask him to do any business for you there? * * * A. Never."

Exporting was not a regular part of appellant's business; appellant had exported only once or twice before 1940 and nothing after July 2, 1940, except for the three shipments to Estrin noted below, which amounted in all to less than $16,000 (228-9; 235-6; Govt's. Exs. 16-18).

While in Brazil, Dr. Estrin wrote to Mr. Cooper that he had become acquainted with some jewelers and could earn

some of his expenses by importing and selling to them (190-192). On March 28, 1941, Dr. Estrin sent to appellant five orders from five jewelry houses for various quantities of pure platinum in bars (226-7, 248-250; Respondent's Exhibit 8). These orders appeared regular and bona fide in every respect, Dr. Estrin writing that the firms were A-1 (id.). "There was nothing unusual about an order for platinum"; the quantities were not unusual—"we sell that every day in the week" (228). On May 6, 1941, respondent applied, openly and regularly and through regular channels, for export licenses to fill these orders. In a paper—which the evidence fails to show was ever signed or transmitted (222-3)—relating to those applications, petitioner's secretary, young Cooper—without consulting or informing Cooper, Sr. (233)—on May 7, 1941, referred to "Our agent, Dr. Seymour Estrin. * * * He is the son-in-law of the president of this firm. Dr. Estrin's main purpose in Rio de Janeiro is to conduct a study in certain Tropical Diseases. His stay there shall last about a year and a half. The fact that our representative * * *" (Govt's. Ex. 31; 222-3, 233). Those applications were rejected, and renewal applications were filed (204-207, 226-8; Govt's. Ex. 19-29). These also were rejected, the last rejection being around June 26, 1941 (227-8).

Thereupon, Mr. Cooper wrote to Dr. Estrin that licenses could not be procured, and the platinum, therefore, would not be exported (227). The matter was dropped.

Months later, Dr. Estrin wrote asking for platinum rings (192, 228). Mr. Cooper sent to him certain pages of standard catalogs issued by ring stamping concerns (see Respt's. Ex. 2) and asked him to specify the desired styles according to the numbers appearing in the catalogs (193).

Dr. Estrin wrote in such specifications. Mr. Cooper also inquired of Dr. Estrin what kind of platinum was wanted in the rings, and Dr. Estrin specified pure platinum (193).

In the light of his knowledge and personal experience, there was nothing abnormal in that specification (159-160, 193-6, 210, 224-5, 233, 291; Rept's. Ex. 3 for Iden.).

With the specifications thus clarified, petitioner proceeded to manufacture and ship (193, 228-232).

These shipments were to Estrin as an independent contractor, and for his own personal account and exclusively for his own benefit (192-3, 233). Dr. Estrin wrote to the petitioner that "he has orders for these rings and he can make a profit" (192), that "he had a chance to sell them to various jewelry stores" (233):

> "Q. Was anything said as to *who would get the profit*, you or he? A. *He*.
>
> Q. What were you to get out of this? A. *I just would charge him the cost*. I wanted to help him out" 192-3).
>
> * * * * *
>
> "Q. *Was Dr. Estrin representing you in Rio de Janeiro* in connection with that end of these transactions? A. *He did not*.
>
> Q. *He was your agent*; was he not? A. *Not at all*" (222, cross-exam. of Cooper).

Dr. Estrin never reported to appellant what he did with the merchandise (232-3).

Estrin never remitted; he retained the money (233):

> "Q. Was any money sent to you for any of this merchandise * * * either by Dr. Estrin or anyone else in Brazil? A. No.
>
> Q. You have never gotten paid for these items? A. No, Dr. Estrin retained the money."

It is apparent from the testimony that the shipments to Dr. Estrin were not in furtherance of petitioner's busi-

ness. The shipments were not to customers of the petitioner or in fulfillment of orders to the petitioner. They were shipments to a son-in-law at cost to enable the son-in-law to make a profit for himself exclusively. Dr. Estrin was not to sell these rings for the petitioner, or as a representative of the petitioner; he was to sell them as his own property, in his own name, for his own exclusive benefit.

The majority opinion (485) cites the above quoted unsigned and untransmitted Government's Exhibit 31 as an admission of agency which outweighs the uncontradicted evidence to the contrary. In so doing, the learned judges overlooked the fact that the paper merely "*came from the files" of the petitioner's own office* which the petitioner turned over to the investigating customs officers shortly after the seizure (222-223), and there is no evidence that it, or a counterpart thereof, ever had been signed and given to anybody; for all that appears, the paper may have been a rejected preliminary draft which was not used because of its inaccuracies. More importantly than that, Judges McCord and Waller overlooked the fact that that paper of May 7, 1941 (which was over 10 months before the matter involved here)—assuming its issuance—related to the 5 orders for platinum addressed to the petitioner which Estrin had sent on March 28, 1941. Petitioner could not entertain orders avowedly taken in its name by Estrin without constituting (at least by ratification) Estrin an "agent" or "representative" of some sort. But the authority thus denoted went no further than leave to take orders for submission for consideration. Furthermore, whatever its scope, that "agency" ended when the final refusal of export license on June 26, 1941, led to the rejection of all the orders and instructions to Estrin not to bother further. The exportations which began 5 months later and took place on November 28, 1941,

December 8, 1941 and January 17, 1942 (Govt's. Exs. 16-18; 190, 229-231) and the tender for clearance on March 20, 1942 which is involved here, were not in fulfillment of orders to petitioner from customers solicited by Estrin but shipments to Estrin himself for sale by him for his own account. The purported declaration of May 7, 1941—assuming it was made—had no application whatsoever to these later transactions between petitioner and Estrin, exclusively for the latter's own account. The dissenting judge (who, apparently, also overlooked the absence of proof of signature and issuance) regarded the paper of May 7, 1941 as "a slight circumstance" which was "consistent with an agency but * * * also consistent with Estrin's doing business in Rio for himself, and *the circumstances must yield to* [*the*] *positive testimony" establishing the latter,* citing *Penn. R. R.* v. *Chamberlain,* 288 U. S. 333 (487-8). We go further and urge that the paper has not the value of even "a slight circumstance" in support of agency.

According to the evidence, the attributes of the relationship between agent and principal, or of employee and employer, were completely absent. Dr. Estrin was not under the control or subject to direction of the petitioner, in any respect whatever or to any degree. Petitioner did not fix the prices for Dr. Estrin to charge, did not prescribe the terms of sale or payment, exercised no control whatsoever. Payment by the purchasers from Estrin was not to be made to the petitioner, or for the petitioner's account. Petitioner was to receive only its actual cost; it was to receive that only from Dr. Estrin; *Estrin and Estrin alone was the debtor.* In fact, *Dr. Estrin never remitted even that.*

B. Even if Estrin were an agent, his fraud and illegality (if there were any) were not within the scope of his agency and were in the service of his own ends and, therefore, as a matter of law, not imputable to the petitioner

Even if Dr. Estrin were an agent, the agency did not extend to the commission of violations of laws and the perpetration of frauds.

Except where expressly authorized or knowingly tolerated, violation of law and commission of fraud are not within the scope of an agent's authority (*Deyo* v. *Hudson*, 225 N. Y. 602, 613; *Martin* v. *Gotham National Bank*, 248 N. Y. 313, 318-321; *American Surety Company* v. *Pauly*, 170 U. S. 133; *U. S. Fidelity & Guarantee Co.* v. *Muir*, 115 Fed. 264). And where an agent in the discharge of his principal's business commits frauds or other wrong-doing for his personal benefit, the agent's knowledge and intent and wrong-doing are not imputable to his principal.

> * * * Where one in transacting the business of his principal is committing a fraud for his own benefit, he is not acting within the scope of his authority as his principal's agent and therefore his knowledge of the fraud is not imputed to his principal."
>
> *Lilly* v. *Hamilton Bank*, 178 Fed. 53, 59.

> "When an agent abandons the object of his agency and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment and to that extent ceases to act as agent (*Shipman* v. *Bank of New York*, 126 N. Y. 318, 331; *Welsh* v. *German-American Bank*, 73 N. Y. 424; *Allen* v. *South Boston R. R. Co.*, 150 Mass. 200, 206)."
>
> *Henry* v. *Allen*, 151 N. Y. 1, 11.

See to the same effect, *Florida National Bank* v. *Merchants' & Farmers' National Bank,* 227 Fed. 715; *First National Bank of Sweetwater* v. *Rust,* 257 Fed. 29; *American Surety Co.* v. *Pauly, supra.*

This is not a case where a principal gets the fruit of his agent's wrongdoing. Yet even in that type of a case, the innocent principal is not charged with responsibility for the wrongdoing of the agent, and, for that reason, the principal's liability is limited to that by which he directly benefitted from his agent's unauthorized wrongdoing. Where there is no such direct benefit, the principal is not answerable at all, even though he accepted—innocently—the transactions brought about by the agent (*Deyo* v. *Hudson, supra; Martin* v. *Gotham National Bank, supra; Baldwin* v. *Burrows,* 47 N. Y. 199; *Carlisle* v. *Norris,* 215 N. Y. 400).

> "* * * A principal, in ignorance of the agent's fraud, retains what appears to be the legitimate proceeds of a transaction. That is not enough to bind him as by a ratification. If a principal authorizes his agent to make a sale and the agent, wholly on his own responsibility, aids a buyer in embezzling the purchase money or in swindling some one out of it, the mere receipt and retention of the money by the principal in ignorance of such wrongful acts may not bind him to repay the proceeds of the theft. (Wheeler v. Northwestern Sleigh Co., 39 Fed. Rep. 347, 351; Foote v. Cotting, 195 Mass. 55, 61; 15 L. R. A. (N. S.) 693). We would be carrying remedial liability beyond the logic of any reported case if we charged the defendants with responsibility for Mitchell's false promise. The peculiar doctrines of agency are not to be extended beyond the limitations of common sense."
>
> *Deyo* v. *Hudson, supra,* at pages 614-615.

What was said in *Carlisle* v. *Norris, supra,* at page 415, is applicable here:

> "The defendants were not bound at this time to treat with Bouwer as a thief; they had a right to assume that he was an honest man. They were not bound to conjure up all such doubts and suspicions, if any, as might have been suggested to the mind of a very vigilant and mistrustful person. * * *
>
> If defendants received the proceeds in good faith and without notice of any wrong and credited them on an indebtedness due them, plaintiff is not entitled to recover them back."

Whatever Estrin did obviously was not in the service of the petitioner but for his own advantage. Nothing that he did inured to the benefit of the petitioner.

Petitioner had absolutely nothing to do with Dr. Estrin's negotiations and transactions with jewelers in Brazil (except as to the early orders which were rejected and abandoned months before there was any shipment). Dr. Estrin's consummated transactions were his independent transactions, exclusively for his own benefit. So were the arrangements, if any, which he made or contemplated for the disposition of the rings here involved. None thereof was in the name, or for the account, or for the benefit, of petitioner. No benefit to the petitioner ever inured therefrom or ever could inure therefrom.

In those circumstances, Dr. Estrin's intentions, designs, purposes and machinations (if there were any) would not be imputed to the petitioner in any ordinary civil litigation. Surely, they cannot be imputed to the petitioner for the purpose of branding petitioner a violator of a penal law and subjecting it to a forfeiture for criminality.

V

There is no evidence that Estrin had the intent and purpose attributed to him by the decisions below.

It is to be assumed that in the six years which (over petitioner's protests) intervened between the seizure and the trial, the Government, through its vast and efficient and diligent investigatory resources, dug up all the procurable evidence. The Government took six depositions in New York; those are in evidence (266-321). It took six depositions in Brazil on written interrogatories at the administration of which petitioner was not represented; those six depositions are in evidence (107-151, 323-465). The Government fully interrogated Dr. Estrin—but it abstained from introducing the record of that interrogation, and it refused to allow petitioner to introduce it in evidence (236-243).

The inference is inescapable that the Government had no inculpating evidence from Dr. Estrin. The evidence adduced in New York fail to inculpate. The Brazilian depositions, it is submitted, also are barren; they fail to establish that Dr. Estrin asked for the shipment of those rings for any purpose other than to sell them as rings to jewelers who desired them for their ring business, and they fail to establish that Dr. Estrin had knowledge or notice that the rings would not be sold or used as rings.

It goes without saying that it is not enough for the evidence to arouse the suspicions of the distrustful and habitually suspecting. To sustain the theory of the decision, there must be clear and persuasive substantial evidence that the rings were destined for conversion to platinum and that Dr. Estrin had notice thereof.

It is significant that the Government took depositions only of bona fide jewelers engaged in the jewelry business in Brazil. That is a concession that the Government

was unable to unearth even a trace of a ring or platinum transaction or negotiation between Dr. Estrin and non-jewelers. Therefore, there is not even a suspicion that Dr. Estrin had offered or disposed, or had undertaken to dispose, of any of the rings to others than bona fide jewelers.

What did the six Brazilian jewelers testify?

Five of them said they had had no business dealing of any kind with Estrin, four of them swearing they never saw him and never had heard of him (125-6, 342-3, 379-383, 415-428, 452-465; see, however, Respt's. Ex. 8 as to three of them).

In direct contradiction of the Government's suppositions, a number of these Brazilian jewelers testified to the existence of a bona fide trade demand for, and use of, "semi-finished" *pure* platinum wedding and engagement rings. Others of the six, however, testified to the contrary; there was disagreement among the six on every point of the interrogation. Meacham (a Britisher) and Kalman, testified that "it was customary to make up rings from rough semi-manufactured article, and to make up for special order; both were customary" (122) and that "due to shortage of labor, it was more common" for the jewelers in Rio de Janeiro to "manufacture rings from the semi-finished article" (135-137). And so both of them described themselves as manufacturers of rings and as "finishers of manufactured or semi-manufactured rings" (107-108, 128). So also did Alfredo Joseph of Krause & Cia (356-359). Therefore, there was a demand for roughly fashioned wedding and engagement rings, both of pure platinum and alloyed platinum (136).

As to the use of pure platinum for rings: Emanuel Block (of French birth), an *operator of eight shops* (322-4), testified that "*in accordance with my knowledge all wedding and engagement rings are made of pure platinum*" (325-6, 340). Kalman said that he furnished pure platinum

rings to order (130). Meacham testified that it was "customary to manufacture pure platinum rings for special order" (121-2) but his concern used only alloyed platinum (108). Meacham testified further that it was deemed proper practice to make the engagement ring prongs of pure platinum (122-3).

The Government's deposition witnesses Meacham and Kalman testified also that palladium rings were made and sold in Brazil during the recent war, Meacham saying that they were "common" due to scarceness of platinum and they were "common" in various parts of the world during the first world war (116, 118-119). This is significant because the second of appellant's three previous shipments to Dr. Estrin (see Govt's. Ex. 17) was of palladium rings, and it was the Government's theory that nobody wore a palladium ring and, therefore, the order for palladium rings was notice to appellant that it was the metal and not the rings which was wanted by Estrin and the people with whom Estrin was dealing. These witnesses of the Government showed how unfounded and imaginary were the Government's hypotheses and accusations (see also Cooper's uncontradicted testimony at 230-231 as to the generality of the use of palladium for rings and other jewelry especially when platinum is not available).

The single witness who testified to having had business dealings with Estrin, Kalman, testified to two very limited transactions. At an unspecified date, he bought from Estrin 350 grams of pure platinum "in the form of rings"; that purchase was not preceded by an order, either oral or written; it was a one-step transaction of purchase and delivery, at 50 cruzieros per gram (139-142). In addition, Kalman placed with Estrin "a verbal order for 1 kilo of platinum which I never received" (139-140); that order was for platinum in bars at 48 cruzieros per gram (140) —as distinguished from 50 paid for the rings; that 1 kilo order was not for rings and did not specify rings (142-3, 144-5); the date of that was not fixed except "as more or

less the first half of 1942" (144). Kalman added that he would have accepted rings in place of the platinum in bars he ordered, "because I needed the material" (145), but he did not say that he told that to Estrin, and Estrin never tendered or delivered that platinum in any form (141, 144).

"Some of the rings" of the 350 grams of rings which Kalman purchased and received from Estrin, Kalman said, "I used in the form of rings, and whenever I needed platinum for other work, I melted said rings" (142). However, he "*never told Estrin that he had melted any of the rings*"; "the platinum was mine and I had no obligation to report to Dr. Estrin" (142). He did not tell Estrin what use he would or did make of them (143). "Dr. Estrin did not make (the) suggestion", directly or indirectly or in substance, that if he wanted platinum he could get it by having the platinum "made up into circular form as of a ring and shipped * * * as jewelry" (142). No such thing was discussed (143). He did not agree with Estrin to purchase or receive 84.8 ounces of platinum, or approximately that amount, made up into wedding bands and engagement shanks with settings (144).

Kalman's testimony of his receipt of 350 grams of rings was the only evidence the Government offered of Estrin's disposition of the goods he received from appellant in the three shipments which reached him. Those shipments were, respectively: platinum rings weighing 68.074 ounces on November 28, 1941, palladium rings on December 6, 1941 and platinum engagement rings amounting to $5,208 on January 16, 1942 (Govt's Exs. 16-18; 229-232).

Since 350 grams equal 11¼ ounces, it is obvious that the rings which Estrin sold to Kalman constituted a minor fraction—about 10% or less—of the platinum rings contained in the shipments of November 28, 1941 and January 16, 1942. Of that 10% or less, the Government's evidence is that Kalman melted some—what portion does not ap-

pear—when he needed them to make up other jewelry, but that he did not tell Estrin that he wanted the rings, or would use them, for that purpose.

Nevertheless, from the fact that Kalman, unknown to Estrin, had melted some of the rings and gave Estrin "more or less the first half of 1942" a "verbal order for 1 kilo of platinum" which was never filled, the court concluded that the rings here involved, weighing over 2.63 kilos (1 ounce equals .031103 of a kilo), "or at least a part" of them, were "intended to fill an order by Kardos Kalman * * * for platinum in bars" (467-8).

It is submitted that the conclusion is unwarranted and is a sheer speculation, rather than an inference—much less sound inference—from proven facts, because: (a) There is no evidence that Estrin knew that Kalman was prepared to accept rings in fulfillment of his order for platinum in bars. (b) The absence of evidence as to the date of Kalman's "verbal order" renders impossible the correlation of that order to the March 20, 1942 shipment. (c) Therefore, there is no basis for even a speculation founded upon any fact that any of the seized rings were intended by Estrin for Kalman. (d) Even as to Kalman, the fact that he wanted platinum but was prepared to accept rings, does not warrant the conclusion that he would have taken the rings to use as platinum, for it is at least equally reasonable to infer that he wanted and ordered platinum to use for rings and if unable to get the platinum he was willing to accept already manufactured rings to finish and sell as rings. The latter inference certainly is as reasonable as the former. (e) There is no evidence of any culpatory course of dealing.

Fraud and wrong-doing are not lightly inferred. Even a preponderance of evidence does not suffice. A finding of fraud is unsupportable unless it is based upon evidence which is "clear, unequivocal and convincing" (*U. S.* v.

Maxwell Land Grant Case, 121 U. S. 325, 381; *Farrar* v. *Churchill,* 135 U. S. 609, 615; *Griffith* v. *Commissioner,* 50 F. 2d 782, 6; *Duffin* v. *Lucas,* 55 F. 2d 786, 798; *Foster* v. *McAlester,* 114 Fed. 145); "there must be sufficient competent evidence, as distinguished from mere suspicion, * * * if the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty should be drawn" (*U. S.* v. *Mammoth Oil Company,* 14 Fed. 2d 705, aff'd 275 U. S. 13). Where a civil suit is predicated upon charges of criminal conduct, the defendant is called upon to offer a defense only "when *pretty stringent proof* * * * is produced" (*Mammoth Oil Company* v. *U. S.,* 275 U. S. 13, 51). "*The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose;* and anyone who alleges that such acts are done in bad faith, or for a dishonest or fraudulent purpose, takes upon himself the business of showing same" (*Jones* v. *Simpson,* 116 U. S. 609, 615, emphasis supplied).

VI

There is a fatal variance between the allegations of the libel and the theory of the judgment.

The basis of the judgment is not proof of the allegation in the libel that the seized merchandise was platinum metal (in Dept. of Com. Class No. 6922) which required a special license.

The basis of the judgment is that although objectively the merchandise was platinum jewelry or jewelry findings, parts or materials (in Dept. of Com. Class No. 9620 or 9635) for which the Export Control Schedules granted a general license, nevertheless, a special license was necessary here because, in the opinion of the court, the rings were wanted in Brazil, and were destined for use there, as platinum.

No allegations to that effect are in the libel. No one reading the libel can gather therefrom that to the basis of the Government's case.

That variance was urged at the trial as a basis for dismissal (59-60, 148-151, 250). Surely a proceeding of this nature, quasi-criminal if not criminal in character, and founded upon a determination of criminal wrong-doing, requires a regard for, and adherence to, the principle of *judicata secundum allegata.*

VII

In any event, this proceeding was unauthorized because 22 U. S. C. 401 does not apply to a violation of Section 6 of the Act of July 2, 1940.

The Act of July 2, 1940, was a special and temporary emergency act. It was designed to meet an existing emergency and was limited to that emergency by a provision that "this section shall terminate June 30, 1942, unless the Congress shall otherwise provide".

By its terms, the section was a complete statute. It provided for the desired prohibitions and curtailments, for their effective implementation by "rules and regulations" and sanctions to deter violation and to punish violators. "For the violation of any provision of any proclamation, or of any rule or regulation", issued under the section, it provided that such violator or violators, upon conviction, shall be punished by fine of not more than $10,000.00 or by imprisonment for not more than two years, or both * * *"

It is submitted, as was argued by petitioner at the trial (59-60, 151, 259), if Congress had intended that as an additional, or alternative, penalty, the goods attempted to be exported shall be subject to forfeiture, Congress would

have so provided either by express terms or by some indication that the sanctions therein provided for were cumulative to those which may be applicable under existing general statutes.

In *Wilder Mfg. Co.* v. *Corn Products Co., Inc.*, 236 U. S. 165, in holding that the remedies provided by the Sherman Anti-Trust Law excluded remedies which otherwise might be available, this court said (at pp. 174-5): It is

> "familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute describes', Farmers' & Mechanics National Bank v. Dearing, 91 U. S. 29, 35; Barnet v. National Bank, 98 U. S. 555; Oates v. National Bank, 100 U. S. 239; Stephens v. Mongohela Bank, 111 U. S. 197; Tennessee Coal Co. v. George, 233 U. S. 354, 359; * * *"

See also *Robinson* v. *U. S.*, 142 F. 2d 431.

VIII

Conclusion: A writ of certiorari, it is respectfully submitted, should issue.

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.

July 12, 1949.

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FILED
AUG 27 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 191

JOSEPH B. COOPER & SON, INC., as Owner of 84.80 ounces of Platinum,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITIONER'S REPLY MEMORANDUM

(1) The characterizations in the opposing brief, "illegal subterfuge", "artifice" and the like, as well as most of its other contents, are diametrically contrary to the unanimously confirmed findings of the trial court (468):

> "*Mr. Cooper I hold was entirely forthright in the matter* * * *
> I believe Mr. Cooper innocent of wrong intentions.*"

(2) Petitioner cannot agree that the questions presented are as set forth at page 2 of the brief in opposition. The first thereof is not even presented or indicated or implied in the libel; and one of the points urged against the judgment is that it is on grounds not charged in the libel.

The questions which we believe are presented are the 8 set forth at pages 13-15 of the petition and argued in the 7 points of the supporting brief.

First and foremost is the question whether presentation to a Collector for inspection and clearance—that is,

an application to the government official charged with the duty to determine whether the goods lawfully may be exported—*preliminarily to the placing of the goods in process of being taken out of the country,* under circumstances *where refusal of clearance is certain to end the expectation to export,* can legally be said to constitute the making of "an attempt * * * to export or ship from or take out of the United States".

The argument (at page 9 of the opposition brief) that "only seizure by customs officials when the shipment was in the hands of the carrier prevented the completion of an illegal export" is directly at variance with the Government's testimony (at R. p. 65) that the

> "Pan American Airways and other carriers *would not attempt to make a shipment* until a customs officer had first passed upon this export declaration".

(3) It seems to us that the opposition brief places untenable reliance on the "document" referred to in the footnote on page 5 of the opposition brief. The contents of that "document" are substantially set forth at page 44 of the petition and supporting brief, and the paucity of its evidentiary significance is pointed out at pages 46-7. We believe the Government is in error in its statement that the exhibits "have not been made a part of the record before this court by the petitioner". The petition is predicated upon the entire record, including the exhibits. The exhibits are not physically in this Court only because they are still in the custody of the Clerk of the Court of Appeals pursuant to the order (R. pp. 476-7) which dispensed with the printing of the exhibits and provided for the submission and consideration of the originals in lieu of such printing.

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.

August 26, 1949.